

## § 1003.104

charged by the contracting organization. The excess premium amount will be deducted from the penalty and returned to the enrollee.

(5) The OIG will impose an additional \$15,000 penalty for each individual not enrolled when CMS determines that a contracting organization has committed a violation described in paragraph (f)(3)(ii) of this section.

(6) For purposes of paragraph (f) of this section, a violation is each incident where a person has committed an act listed in § 417.500(a) or § 434.67(a) of this title, or failed to comply with a requirement set forth in § 434.80(c) of this title.

(g) The OIG may impose a penalty of not more than \$25,000 against a health plan for failing to report information on an adverse action required to be reported to the Healthcare Integrity and Protection Data Bank in accordance with section 1128E of the Act and § 1003.102(b)(5)(ii).

(h) For each violation of § 1003.102(b)(11), the OIG may impose—

(1) A penalty of not more than \$50,000, and

(2) An assessment of up to three times the total amount of remuneration offered, paid, solicited or received, as specified in § 1003.104(b).

(i) For violations of § 1003.102(b)(14) of this part, the OIG may impose a penalty of not more than the greater of—

(1) \$5,000, or

(2) Three times the amount of Medicare payments for home health services that are made with regard to the false certification of eligibility by a physician in accordance with sections 1814(a)(2)(C) or 1835(a)(2)(A) of the Act.

(j) The OIG may impose a penalty of not more than \$10,000 per day for each day that the prohibited relationship described in § 1001.102(b)(12) of this part occurs.

(k) For violations of section 1862(a)(14) of the Act and § 1003.102(b)(15), the OIG may impose a penalty of not more than \$2,000 for each bill or request for payment for items and services furnished to a hospital patient.

(l) For violations of section 351A(b) or (c) of the Public Health Service Act and 42 CFR part 73, the OIG may impose a penalty of not more than \$250,000

## 42 CFR Ch. V (10–1–10 Edition)

in the case of an individual, and not more than \$500,000 in the case of any other person.

(m) For violations of section 1860D–31 of the Act and 42 CFR part 403, subpart H, regarding the misleading or defrauding of program beneficiaries, or the misuse of transitional assistance funds, the OIG may impose a penalty of not more than \$10,000 for each individual violation.

[57 FR 3346, Jan. 29, 1992, as amended at 59 FR 32125, June 22, 1994; 59 FR 48566, Sept. 22, 1994; 60 FR 16584, Mar. 31, 1995; 60 FR 58241, Nov. 27, 1995; 61 FR 13449, Mar. 27, 1996; 61 FR 52301, Oct. 7, 1996; 64 FR 39429, July 22, 1999; 65 FR 18550, Apr. 7, 2000; 65 FR 24416, Apr. 26, 2000; 65 FR 35584, June 5, 2000; 67 FR 76905, Dec. 13, 2002; 69 FR 28845, May 19, 2004]

### § 1003.104 Amount of assessment.

(a) The OIG may impose an assessment, where authorized, in accordance with § 1003.102, of not more than—

(1) Two times the amount for each item or service wrongfully claimed prior to January 1, 1997; and

(2) Three times the amount for each item or service wrongfully claimed on or after January 1, 1997.

(b) The assessment is in lieu of damages sustained by the Department or a State agency because of that claim.

[65 FR 24416, Apr. 26, 2000]

### § 1003.105 Exclusion from participation in Medicare, Medicaid and all Federal health care programs.

(a)(1) Except as set forth in paragraph (b) of this section, the following persons may be subject, in lieu of or in addition to any penalty or assessment, to an exclusion from participation in Medicare for a period of time determined under § 1003.107. There will be exclusions from Federal health care programs for the same period as the Medicare exclusion for any person who—

(i) Is subject to a penalty or assessment under § 1003.102(a), (b)(1), (b)(4), (b)(12), (b)(13) or (b)(15); or

(ii) Commits a gross and flagrant, or repeated, violation of section 1867 of the Act or § 489.24 of this title on or after May 1, 1991. For purposes of this section, a gross and flagrant violation is one that presents an imminent danger to the health, safety or well-being of the individual who seeks emergency

examination and treatment or places that individual unnecessarily in a high-risk situation.

(b)(1)(i) With respect to any exclusion based on liability for a penalty or assessment under § 1003.102 (a), (b)(1), or (b)(4), the OIG will consider an application from a State agency for a waiver if the person is the sole community physician or the sole source of essential specialized services in a community. With respect to any exclusion imposed under § 1003.105(a)(1)(ii), the OIG will consider an application from a State agency for a waiver if the physician's exclusion from the State health care program would deny beneficiaries access to medical care or would otherwise cause hardship to beneficiaries.

(ii) If a waiver is granted, it is applicable only to the State health care program for which the State requested the waiver.

(iii) If the OIG subsequently obtains information that the basis for a waiver no longer exists, or the State agency submits evidence that the basis for the waiver no longer exists, the waiver will cease and the person will be excluded from the State health care program for the remainder of the period that the person is excluded from Medicare.

(iv) The OIG notifies the State agency whether its request for a waiver has been granted or denied.

(v) The decision to deny a waiver is not subject to administrative or judicial review.

(2) For purposes of this section, the definitions contained in § 1001.2 of this chapter for "sole community physician" and "sole source of essential specialized services in a community" apply.

(c) When the Inspector General proposes to exclude a nursing facility from the Medicare and Medicaid programs, he or she will, at the same time he or she notifies the respondent, notify the appropriate State licensing authority, the State Office of Aging, the long-term care ombudsman, and the State Medicaid agency of the Inspector General's intention to exclude the facility.

[59 FR 32125, June 22, 1994, as amended at 64 FR 39429, July 22, 1999; 65 FR 24416, Apr. 26, 2000; 65 FR 35584, June 5, 2000]

#### **§ 1003.106 Determinations regarding the amount of the penalty and assessment.**

(a) *Amount of penalty.* (1) In determining the amount of any penalty or assessment in accordance with § 1003.102(a), (b)(1), (b)(4), and (b)(9) through (b)(16) of this part, the Department will take into account—

(i) The nature of the claim, referral arrangement or other wrongdoing;

(ii) The degree of culpability of the person against whom a civil money penalty is proposed;

(iii) The history of prior offenses of the person against whom a civil money penalty is proposed;

(iv) The financial condition of the person against whom a civil money penalty is proposed;

(v) The completeness and timeliness of the refund with respect to § 1003.102(b)(9);

(vi) The amount of financial interest involved with respect to § 1003.102(b)(12);

(vii) The amount of remuneration offered or transferred with respect to § 1003.102(b)(13); and

(viii) Such other matters as justice may require.

(2) In determining the amount of any penalty in accordance with §§ 1003.102 (b)(5) and (b)(6), the Department will take into account—

(i) The nature and circumstances of the failure to properly report information, or the improper disclosure of information, as required;

(ii) The degree of culpability of the person in failing to provide timely and complete data or in improperly disclosing, using or permitting access to information, as appropriate;

(iii) The materiality, or significance of omission, of the information to be reported, or the materiality of the improper disclosure of, or use of, or access to information, as appropriate;

(iv) Any prior history of the person with respect to violations of these provisions; and

(v) Such other matters as justice may require.

(3)(i) In determining the amount of any penalty in accordance with § 1003.102(b)(7), the OIG will take into account—